

OIFIG AN ARD-AIGHNEMEMORANDUM TO AN TAOISEACH

Re: Amendment of Constitution to protect the right
to life of the unborn child.

Preliminary

1. In the light of the commitment given to amend the Constitution for the above purpose I have been giving consideration to the wording which the amendment ought to take. However before one can come to a conclusion concerning an appropriate form of words from the legal point of view it is necessary to be clear as to what precisely it is sought to achieve from the point of view of political policy. I am not absolutely clear concerning this aspect of the matter.
2. However I have taken a certain starting point. I conceive the aim to be as follows
 - (a) to put in an amendment to the Constitution which would render unconstitutional any future legislation for the legalising of or the increased facilitating of abortion (b) not, at the same time, to effect the existing law be it statutory or constitutional in any way, and in particular not to interfere with existing rights or to render the existing law more restrictive than it is.

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3. My understanding of what it is sought to achieve as set out in the previous paragraph seems to accord with the stated aims of the body known as the "Pro-life amendment campaign" although it seems to me that there are certain worrying ambiguities in their attitudes or so I read in their statements. Upon the basis of the foregoing it seems important to try to reach some reasonable appreciation of what is in fact the existing law.

Existing Law.

4. The Pro-life amendment people state that they are making no attempt to change or strengthen the present law. They state with quite extraordinary confidence that the present law permits operations to save the life of the mother. However it is not at all clear whether they mean all operations where the life of the mother is in serious and imminent danger as a result of a pregnancy or only some selected operations. I refer in this context to a statement of the 19th May, 1982 issued by the Chairman of the Organisation Dr. Julia Vaughan expressed to be a response to remarks of the Reverend Professor Brendan O'Mahony in a paper read by him. At page 5 of that statement it is blandly stated that a hysterectomy to save the life of a

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pregnant woman suffering from cancer of the uterus, or the removal of an abnormal fallopian tube in the case of an ectopic pregnancy, are perfectly permissible under existing law. On the other hand at page 6 of the same statement the question of whether "other life threatening situations", requiring operation, are protected by the existing law is quite frankly dodged.

6. I wish I could feel as certain as this Committee feels about what the existing law is. So far as statute law is concerned they are of course referring to Section 58 of the Offences Against the Person Act, 1861. Paraphrased, this makes it an offence unlawfully to administer poison or to use an instrument on any woman with intent to procure her miscarriage.
7. The degree of certainty expressed by the pro-life amendment campaign concerning the state of the existing law seems strange when one considers that in the 121 years that have elapsed since the enactment of that section not one sentence occurs in any Irish reported case concerning its meaning. Indeed in the United Kingdom the only case which appears to have directly considered the situation where an operation was performed to save the life of the mother was

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Rex V Bourne 1939 IKB page 687. The case is unsatisfactory because it is a mere record of a charge given by a trial judge to a jury and since the jury acquitted the accused the principles of law set out in the charge were never the subject matter of consideration on appeal. However the law as set out in the charge was as follows.

The Judge took as his starting point that at common law, while abortion was a crime, the mother had a right to have an abortion performed on her for the purpose of preserving her own life. Then the trial judge decided that the word "unlawfully" in the section imported that right in to the statute and indeed said that the burden was on the prosecution to show (having regard to the word "unlawfully") that the operation was not done in good faith for the purpose only of preserving the life of the mother. However the case is from the Irish point of view somewhat unsatisfactory for another reason. The facts turned, not upon an imminent danger to life in the physical sense, but upon the proposition (grounded on psychiatric evidence) that if the pregnancy continued the mother was likely to be made a physical or mental wreck.

The pro-life amendment people draw attention to the

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words "with intent to procure a miscarriage" in the section and argue that if the intent is to save the life of the mother no offence is committed under existing law. There is much to be said for this contention but I am by no means satisfied that it is necessarily or absolutely correct particularly in the absence of any judicial authority at all on the subject.

8. Having regard to the total absence of judicial pronouncements in Ireland and the single and somewhat unsatisfactory judicial pronouncement in England to which I have referred I can do no more than express my own personal view concerning how I feel the section would be construed in Ireland. On balance I feel that in Ireland the Courts would regard it as a good defence to a prosecution under the section to show that the operation was performed in circumstances where there was a serious or grave or imminent threat to the life of the mother from the physical point of view. Furthermore, I think the Court would probably agree that there was a burden on the prosecution to show that this bona fide intention did not exist. I do not however think that the Irish Courts would so construe the section as to render it a defence to a charge of abortion that the operation was performed to

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prevent damage to the psychiatric or mental health of the mother. In other words I am of opinion that it is permissible under existing law to save the life of the mother by such an operation in any reasonable life threatening situation, judged for the medical point of view, and not merely in the two situations of a cancerous uterus or a ectopic pregnancy to which the pro-life amendment campaign have directed their primary attention. I suggest that it is important to preserve for the mother a right to have her life saved to the extent to which I conceive the existing law presently protects it.

9. Apart from statute law there is the question of the Constitution. Clearly the appropriate article to which to add the amending subsection is Article 40. Section 3 subsection 2 of that Article provides that the State shall in particular by its laws protect as best it may from unjust attack and in the case of the injustice done vindicate the life of every citizen. That is a guarantee of the right to life of living persons. It is important that any amendment catering for the right of the unborn should not be so framed as to reduce the guarantee of the right to life of the living or exhalt the guarantee of the right to life of the unborn above the right to life of the living.

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Considerations of possible draft amendments.

10. In the light of the foregoing it may be convenient at this stage to consider some draft amendments. I have received two suggested drafts from the pro-life amendment campaign. The first was sent to me informally by letter from Mr. Frank Ryan (a member of the campaign) dated 16th March, 1982 and reads as follows:

"the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend the right to life of the unborn and in particular guarantees not to enact any laws providing for the legalization of any act performed with the intention of procuring a miscarriage."

11. I have considered this amendment myself and I have also discussed it with the Parliamentary Draftsman who has given it independent consideration. While the amendment is superficially attractive we entertain misgivings about it. An express provision in the Constitution guaranteeing the right to life of the unborn might be regarded as placing that right above the right to life "living". In particular it must be remembered that once this amendment becomes part of the Constitution the constitutionality in any

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of its aspects of section 58 of the Offences Against the Person Act, 1861 falls to be considered in the light of this amendment. We entertain fears that a guarantee not to enact any laws providing for the legalisation of any Act performed with the intention of procuring a miscarriage might well have the effect of threatening the right of the mother under the existing section to be operated upon for the purpose of eliminating a serious critical danger to her own life. Nor can one be quite certain that the phrase "as far as practicable" is sufficient to protect the existing right to life of the mother. That might well be held to be directed towards the practical difficulties of enforcement e.g. the impossibility of "policing" every pregnancy to ensure compliance with the Constitution and the law. I feel therefore that amendment should be expressed "subject to the right to life of other persons". If the pro-life amendment people feel that the existing legislation guarantees this right in any event they can scarcely have any objections to the inclusion of a phrase to preserve the existing position as they say they are prepared to do.

12. By letter to me dated the 5th May, 1982 the pro-life amendment campaign produced a different suggested

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amendment. It reads

"the State recognises the right to life of the unborn child from the moment of fertilization and guarantees by its laws to respect and defend such right. No law shall be enacted with the intention of procuring an abortion".

The last sentence of that amendment raises the same worries as the last phrase of the other amendment with which I have already dealt. Furthermore I have considerable doubt about putting in the phrase "from the moment of fertilization" which seems to me to be more of a scientific than a legal statement and I do not think the Constitution is the place for scientific statements. At the bottom of page 7 of her statement of 19th May, 1982 Dr. Julia Vaughan states "it bears repeating at this point that there can of course be no argument but that human life exists from the moment of fertilization. This is an unassailable scientific fact". Dr. Vaughan may consider it to be an unassailable scientific fact and indeed my own view would sympathise with her in that regard but the fact is that other scientific views are being actively canvassed. If Dr. Vaughan's view is correct then there is no need whatever to put in this scientific phrase "from the moment of fertilization". The fertilized ovum is "an unborn"

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If she is or turns out to be scientifically incorrect (which I think is very unlikely) the phrase should not be there. On the one hand it is unnecessary and on the other hand undesirable.

13. Perhaps I should say that if I had to choose between the two amendments put forward by the pro-life amendment campaign I should prefer the former rather than the latter amendment.

14. A group calling themselves "The Responsible Society" with an address of 24, Upper FitzWilliam Street, Dublin 2. suggested in the amendment

"the State recognises the right to life of every unborn child from the moment of fertilization and guarantees to protect this right by its laws".

For the reasons already stated I would not be happy with that form of amendment.

15. In the context of the pro-life campaign amendments consideration might also be given to the mere simple amendment "the State guarantees in its laws to respect and as far as practicable by its laws to defend the right to life of the unborn". For the reasons stated a worry is entertained concerning the specific giving of a "guarantee" without any saving clause for other rights.

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16. The Parliamentary Draftsman has produced a number of alternative amendments for discussion. I do not propose to overburden this Memo by producing all of the alternatives. I extract the following which (I commend for approval

"the State acknowledges the right to life of the unborn. The State, therefore, condemns abortion and, subject to the right to life of other persons, guarantees in its laws to respect, and as far as practicable by its laws to defend, the right to life of the unborn."

This amendment seems to me to strike the balance between what it is sought to achieve on the one hand and the preservation of the existing rights statutory or constitutional as the case may be of the threatened mother on the other hand. There is of course a question as to whether or not it is somewhat inelegant to use the word "abortion" expressly but I do not see any particular objection to it. There is also the fact that the pro-life amendment campaign people may think that the phrase "subject to the right to life of other persons" is opening a door but if they themselves say that operations to save the life of the mother are presently permissible and, if they are not as selective about the type of operations as I greatly fear they are, they can scarcely object to an amendment being

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balanced in that form.

General observations.

17. For the sake of completeness I feel I should make one or two other observations. A medical fear has been expressed that certain contraceptive pills may now suddenly become illegal e.g. the so-called "morning after" pills which prevent "implantation". I am afraid this is a risk which will have to be taken. I do not see at present how one can provide for it in a constitutional amendment. In any event in practice I doubt if any significant problem will arise.
18. The case of abortion where a woman has conceived as a result of rape has been raised. Whatever my personal views be I do not think that this situation can be exempted, for ^{the} ~~at~~ present at any rate.
19. The other major circumstance which is raised is the question of an abortion where the foetus is so severely deformed that it does not have the capacity to survive as a conscious human being and the mothers mental health might thus be seriously impaired. This is the case frequently referred to as anencephaly. Since this instance would extend

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protection to operations carried out because of a risk to mental health I do not feel that in the climate of what it is sought to achieve it is possible to exempt it from the general prohibition. Nothing else presently occurs to me.

Pátric Ó Connolly

14 June, 1982.